Lee Soo Chew v Wang Fatt (Johore) Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 25-1155 OF 1987
ABDUL MALIK ISHAK J
1 JANUARY 1996

Civil Procedure *— Trial — Inspection of premises — Inspection by judge — Whether judge could visit locus in quo prior to hearing of main suit — Purpose and evidential value of inspection — Whether both parties should be present — Rules of the High Court 1980 O 35 r 5*

On 28 November 1995, the first defendant's solicitors wrote to the plaintiff's solicitors requesting access to the plaintiff's premises by an expert for an inspection to assess damage to the premises. This request was refused. On 16 December 1995, the first defendant applied to the court seeking an order that the plaintiff give access to the premises so as to allow the trial judge and parties involved to inspect them. The trial of the main action was fixed for 8 and 9 January 1996 and this application was heard on 1 January 1996. The issue for decision was whether the trial judge was empowered to visit the plaintiff's premises before the hearing of the main suit.

Held, dismissing the first defendant's application:

(1) An inspection by a judge pursuant to O 35 r 5 of the Rules of the High Court is solely for the purpose of enabling the judge to understand the questions raised and thereafter to follow and apply the relevant and admissible evidence. By 'evidence' is meant the oral testimony of the witness and using this as a barometer, the judge may inspect after recording the evidence of the witness and not before; such evidence adds nothing to what the judge has seen on inspection (see p 4E–G; *London General Omnibus Co v Lavell* [1901] 1 Ch 135 followed).

(2) It was appropriate that the trial judge should visit the locus in quo in the presence of both parties and this was the best way to avoid any allegation of bias. But if the trial judge were to hold a private view of the public place without the consent of both parties and in their absence it would be undesirable, though not improper. The undesirable feature of visiting the locus in quo without the presence of both parties would project itself when the circumstances and the surroundings affecting the scene might have been changed (see pp 4I and 5A; *Goold v Evans & Co* [1951] TLR 1189 and *Hare v British Transport Commission* [1956] 1 All ER 578; [1956] 1 WLR 250 followed).

(3) Accordingly, an inspection by a trial judge should be made when the trial is in progress and the parties are present during the visit to the locus in quo. The view could be treated as real evidence, or as something which enabled the court to better understand the evidence which had already been given by witnesses (see p 6B–D; *Goold v Evans & Co* [1951] TLR 1189 followed).

[**Bahasa Malaysia summary**

Pada 28 November 1995, peguam defendan pertama menulis kepada peguam plaintif memohon akses ke premis plaintif oleh saksi pakar untuk satu pemeriksaan pagi menaksir keroskan yang telah berlaku pada premis itu. Permintaan ini telah ditolak. Pada 16 Disember 1995, defendan pertama memohon kepada mahkamah meminta perintah bahawa plaintif memberi akses ke premis itu untuk membenarkan hakim perbicaraan dan pihak-pihak yang terlibat untuk memeriksanya. Perbicaraan tindakan utama ditetapkan untuk 8 dan 9 Januari 1996 dan permohonan ini didengar pada 1 Januari 1996. Isu untuk keputusan adalah sama ada hakim perbicaraan berkuasa melawat premis plaintif sebelum mendengar guaman utama.

Diputuskan, menolak permohonan defendan pertama itu:

(1) Pemeriksaan oleh seorang hakim mengikut A 35 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 hanyalah untuk membolehkan hakim memahami persoalan yang timbul dan selepas itu untuk mengikut dan memakai keterangan yang relevan dan boleh diterima. 'Keterangan' bermakna testimoni lisan saksi dan dengan menggunakan ini sebagai barometer, hakim boleh membuat pemeriksaan selepas merekod keterangan saksi dan bukan sebelumnya; keterangan sebegitu tidak menambah kepada apa yang telah dilihat oleh hakim semasa pemeriksaan (lihat ms 4E–G; *London General Omnibus Co v Lavell* [1901] 1 Ch 135 diikut).

(2) Adalah sesuai untuk hakim perbicaraan melawat locus in quo dengan kehadiran kedua-dua pihak dan ini adalah cara paling baik untuk mengelakkan dari berlakunya dakwaan berat sebelah. Tetapi jika hakim perbicaraan membuat lawatan persendirian ke tempat am tanpa persetujuan kedua-dua pihak dan tanpa kehadiran mereka ia adalah tidak diingini, tetapi bukannya salah. Ciri yang tidak diingini tentang lawatan ke locus in quo tanpa kehadiran kedua-dua pihak akan menyerlah sendiri apabila keadaan dan kawasan sekeliling yang berkaitan dengan tempat itu mungkin telah diubah (lihat ms 4I dan 5A; *Goold v Evans & Co* [1951] TLR 1189 dan *Hare v British Transport Commission* [1956] 1 All ER 578; [1956] 1 WLR 250 diikut).

(3) Oleh itu, pemeriksaan oleh hakim perbicaraan sepatutnya dibuat apabila perbicaraan sedang dijalankan dan kedua-dua pihak hadir semasa lawatan ke locus in quo itu. Tinjauan itu boleh digunakan sebagai keterangan benar, atau sesuatu yang membolehkan mahkamah memahami dengan lebih baik keterangan yang tekah diberi oleh saksi-saksi (lihat ms 6B–D; *Goold v Evans & Co* [1951] TLR 1189 diikut).]

Notes

For cases on trial, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3593–3642.

For cases on O 35 r 5 of the Rules of High Court, see Malaysian

A Court Practice, High Court Practice [35.5.1]–[35.5.3].

Cases referred to

Buckingham v Daily News Ltd [1956] 2 QB 534; [1956] 2 All ER 904; [1956] 3 WLR 375

B *Goold v Evans & Co* [1951] TLR 1189

Hare v British Transport Commission [1956] 1 All ER 578; [1956] 1 WLR 250

London General Omnibus Co v Lavell [1901] 1 Ch 135

MBf Finance Bhd v Global Pacific Textiles Industries Sdn Bhd (In receivership) & Anor [1993] 4 CLJ 379

C *Salsbury v Woodland & Ors* [1970] 1 QB 324; [1969] 3 All ER 863; [1969] 3 WLR 29

Scott v Numurkah Corp (1954) 91 CLR 300

Legislation referred to

D Rules of the High Court 1980 O 35 r 5

Tan Jin Wah (Tan & Tan) for the plaintiffs.
Ho Thian Cheh (Ho Thien Cheh & Co) for the defendants.

E **Abdul Malik Ishak J**: This was an application by the first defendant ('encl 110') for the following prayers:

(1) that the plaintiff do open the door and/or allow access to his premises No 16 & 16A, Jalan Siew Nam, 80000 Johor Bahru, for an inspection by the learned judge by whom this case is tried, during the trial of this
F action and/or at such time as may be ordered by this honourable court;

(2) that all parties and their witnesses be permitted to be present and be permitted to inspect view the premises during the inspection by the learned judge;

G (3) that the parties and their witnesses be permitted to take photographs of the premises;

(4) any further or other order deem fit and proper by this honourable court; and

(5) that the costs of and incidental to this application and the costs and
H expenses of and incidental to the inspection of the premises be costs in the cause.

An affidavit ('encl 109') in support of the application was filed on 16 December 1995 and affirmed by Mr Tan Jin Wah on the same day. It was averred in that affidavit that the first defendant's solicitors had written
I a letter dated 28 November 1995 to the plaintiff's solicitors, inter alia, requesting access to the plaintiff's premises by the first defendant's expert for an inspection for the purpose of rendering his opinion. No reply was received to this letter and a reminder vide letter dated 9 December 1995 was forwarded to the plaintiff's solicitors. A reply was duly received on

12 December 1995 and in that reply the plaintiff's solicitors refused access to the first defendant's solicitors. Incidentally, Mr Tan Jin Wah, learned counsel for the first defendant, argued that such an inspection was material and the report by an expert of the plaintiff's premises would determine the whole issue.

Mr Ho Thian Cheh, learned counsel for the plaintiff, opposed the application and he argued that the application was not only without precedent, it was also without any basis. It was submitted that the proper time for the first defendant's expert to gauge the damage to the plaintiff's premises would be in early 1984 and, if at all, by the latest it should be on 30 September 1989 when the summons for directions was filed.

Three observations must be made here. Firstly, the trial of the main suit has been fixed for two days in the early part of January 1996 — to be precise on 8 and 9 January 1996. Secondly, the application in encl 110 was heard by me on 1 January 1996. Thirdly, prayer 1 of encl 110 sought to turn the judge into a witness in the event the judge visited the plaintiff's premises before the trial of the main suit and this would turn the role of the judge from an adjudicator into a spectator, so to speak. From these three observations spring an interesting issue and this revolves around the question of whether the judge is empowered to visit the plaintiff's premises before the hearing of the main suit.

Order 35 r 5 of the Rules of the High Court 1980 lays down the situation wherein an inspection may be carried out by a judge. It says that a judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause or matter and that all such expenses shall be costs in the proceedings. It is obvious that an inspection of this nature is solely for the purpose of enabling the judge to understand the questions raised and thereafter to follow and apply the relevant and admissible evidence. By evidence, it refers to the oral testimony of the witness and using this as a barometer, the judge may inspect after recording the evidence of the witness and not before; such evidence adds nothing to what the judge has seen on inspection (*London General Omnibus Co v Lavell* [1901] 1 Ch 135, CA). The value to be attached to an inspection by a Judge has been described by Birkett LJ, in *Buckingham v Daily News Ltd* [1956] 2 QB 534; [1956] 2 All ER 904; [1956] 3 WLR 375 in impeccable language:

> ... when a judge goes to see machinery, and sees it in operation when the parties are present and everything is done regularly and in order, it is just the same as though the machine were brought into court and the demonstration made in the well of the court, so that the judge or judges may see it.

It is apt that the trial judge should visit the locus in quo in the presence of both parties (*Goold v Evans & Co* [1951] TLR 1189 at p 1191) and this is the best way to avoid any allegation of bias. But if the trial judge were to hold a private view of a public place without the consent of both parties and in their absence it would be undesirable, though not improper. The undesirable feature of visiting the locus in quo without the presence of

A both parties would project itself when the circumstances and the surroundings affecting the scene might have been changed (*Hare v British Transport Commission* [1956] 1 All ER 578; [1956] 1 WLR 250). The English Court of Appeal had occasion to consider the propriety of the trial judge having a private view without the parties being present. Widgery LJ, in *Salsbury v Woodland & Ors* [1970] 1 QB 324; [1969] 3 All ER 863; B [1969] 3 WLR 29, was of the opinion that 'the expression "view" is used indifferently to describe two different things'. His Lordship sought to highlight the situation where 'some kind of demonstration in which the event of the accident are to be reconstructed or simulated', and in such a case it was said that it would be 'exceedingly dangerous' for the trial judge C to attend the demonstration alone and without the parties. His Lordship was of the opinion that if the trial judge goes to a public place it is unnecessary that the parties should accompany him. The following observations by Denning LJ in *Goold v Evans & Co* sum up the value to be given to an inspection by the trial judge:

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> It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of E having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply. The judge must make his view in the presence of both parties, or at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, without either party present.

F The inspection may be necessary because the evidence may relate to the condition of a particular place like in *Hare v British Transport Commission*, where the judge visited the railway station where the plaintiff was injured or where the object is bulky like a heavy industrial machine which cannot be brought to the court room without some measure of difficulty as G envisaged in *Buckingham v Daily News Ltd* or where the visit to the factory was crucial to decide whether the dyeing machines form part of the land and have acquired the character of a fixture (see *MBf Finance Bhd v Global Pacific Textiles Industries Sdn Bhd (In receivership) & Anor* [1993] 4 CLJ 379).

H In Australia, in the case of *Scott v Numurkah Corp* (1954) 91 CLR 300, the plaintiff who had hired part of the defendants' town hall for the purpose of cinema shows, claimed damages for nuisance caused by noise created by dances taking place in other parts of the town hall. The trial judge, at the suggestion of counsel, went to the town hall during a cinema show and a dance. The High Court of Australia held that what the trial I judge saw was more than a view and that he had witnessed an experiment or demonstration and, consequently, he was not at liberty, as both parties had not concurred, to use conclusions he had formed as a result of that demonstration.

Phipson on Evidence (11th Ed) at p 6 contains a relevant passage on the meaning of the word 'inspection' and for convenience it is reproduced hereinunder :

> Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and as a general rule is allowed whenever it is practicable, and will assist the tribunal in arriving at a decision. The practice dates back for some seven centuries to the old trials by inspection, which were the appropriate means of determining certain questions, eg age, identity, the genuineness of records, mayhem, pregnancy, etc.

Now, it is my judgment that from the authorities cited above the answer to the issue posed would be in the negative. Enclosure 110 was filed prematurely. All the authorities suggest that an inspection by the trial judges would be made when the trials were in progress and the parties were present during the visits to the locus in quo. Denning LJ in *Goold v Evans & Co* spoke of the view as real evidence, but Hodson LJ in the same case treated the view as something which enabled the court to better understand the evidence which had already been given by witnesses. The Court of Appeal in *Buckingham v Daily News Ltd* held that the trial judge had rightly taken into account his opinion of the working of the machine formed at a view. For these reasons, encl 110 was dismissed with costs.

Application dismissed.

Reported by AP Kinnear